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NOTES

Comparable Worth and the Fair Pay Act of 1994

INTRODUCTION

Congress has attempted to close the wage gap that exists between men's and women's compensation since the passage of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.¹ However, Congress' success in raising the level of women's pay to that of men's has been limited.² The statistics relating to pay inequity, even in this "enlightened age," are astounding. Women on the average are paid only seventy-one percent of men's wages.³ Women lose \$420,000 indivi-

¹ *Testimony on Fair Pay Act July 21, 1994: Joint Hearing of Subcomms. of House Education and Labor and Post Office and Civil Service Comms.*, 103d Cong., 2d Sess. (1994), 1994 DLR 139d6, available in LEXIS, BNA Library, DLABRT File (statement of Representative Eleanor Holmes Norton) [hereinafter *Hearing*].

² *Id.* (testimony of Michele Leber, Treasurer, National Committee on Pay Equity) ("The answer, quite simply, is that those laws do not address the deeply-rooted historical bias in compensation systems nor the problem of occupational segregation."); *Testimony July 21, 1994: Joint Hearing on the Fair Pay Act of 1994*, 103d Cong., 2d Sess. (1994), available in LEXIS, Legis Library, Cngtst File (opening statement of Major R. Owens, Congressman) ("[T]he gains for female workers have been painfully slow and pitifully small.").

³ *Hearing, supra* note 1 (testimony of Michelle Leber, Treasurer, National Committee on Pay Equity). Studies show that the wage gap is even wider for minority women: African American women earn only 64% and Hispanic women 55% of what White men earn. *Testimony on Fair Pay Act July 21, 1994: Before the Subcomm. on Select Education and Civil Rights of the House Comm. on Education and Labor and the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 103d Cong., 2d Sess. (1994), available in LEXIS, Legis Library, Cngtst File (testimony of Robert M.

dually over a lifetime due to pay inequity,⁴ and over \$100 billion collectively on an annual basis.⁵ While statistics show that the wage gap has decreased by ten percent since 1980, one-third to one-half of the decrease is not attributable to a rise in women's salaries, but to a decrease in the wages of men.⁶

It is in sex-segregated occupations where the disparity in wages has the widest impact.⁷ "Job segregation intrinsically is connected to wage discrimination because patriarchal influences that restrict women's choices of jobs also depress the wages paid in those jobs."⁸ Women have been historically kept in these occupations at wages well below what they are actually worth.⁹ Those occupations that are lower paying are overwhelmingly female-dominated jobs.¹⁰ As more and more women are

Tobias, National President, National Treasury Employees Union) [hereinafter *Robert M. Tobias*].

⁴ *Testimony on Fair Pay Act July 21, 1994: Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service and the Subcomm. on Select Education and Civil Rights of the House Comm. on Education and Labor*, 103d Cong., 2d Sess. (1994), available in LEXIS, Legis Library, Cngtst File (testimony of Gene R. Voegtlin, Legislative Liaison, National Federation of Federal Employees) [hereinafter *Gene R. Voegtlin*].

⁵ *Hearing, supra* note 1 (testimony of Michele Leber, Treasurer, National Committee on Pay Equity).

⁶ *Pay Equity as a Remedy for Wage Discrimination: Success in State Governments: Testimony Concerning the Fair Pay Act of 1994 Before House Subcomm. on Select Education and Civil Rights*, 103d Cong., 2d Sess. (1994), available in LEXIS, Legis Library, Cngtst File (testimony of Heidi I. Hartmann, Director, Women's Policy Research) [hereinafter *Heidi I. Hartmann*]; *Hearing, supra* note 1 (statement of Representative Eleanor Holmes Norton).

⁷ *Amelia K. Duroska, Comparable Work, Comparable Pay: Rethinking the Decision of the Ninth Circuit Court of Appeals in American Federation of State, County, and Municipal Employees v. Washington*, 36 AM. U. L. REV. 245, 246 (1986) (stating that the wage disparity is most noticeable in occupations where 70% or more of workers are women or 90% or more of workers are men).

⁸ *Id.* at 248.

⁹ *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 719 (7th Cir. 1986) (stating that a politically and socially male-dominated society has steered women into lower paying jobs).

¹⁰ *Hearing, supra* note 1 (statement of Judith L. Lichtman, President, Women's Legal Defense Fund). In the federal sector, women hold two-thirds of the lower graded jobs. *Robert M. Tobias, supra* note 3.

crowded into predominately female occupations, it only serves to saturate the market for those occupations, and thus lowers wages even further.¹¹

Over half of working women and a larger percentage of men are working in occupations dominated by their sex.¹² A study which controlled for productivity-related characteristics, indicated that individuals working in an occupation that is predominantly female still earn significantly less than those in predominantly male occupations.¹³ Many jobs are paid less primarily because they are dominated by women.¹⁴

As the desegregation of occupations is not likely to occur in the near future,¹⁵ further measures are necessary to remedy the present disparities between men's and women's wages which are not addressed by the Equal Pay Act and Title VII. Comparable worth legislation seems to be the only answer.¹⁶

The Equal Pay Act and Title VII have been important tools in remedying wage disparity in the United States. However, the courts are unequipped and unwilling to venture into the comparable worth arena to "finish[] the job" and close the wage gap any further.¹⁷ The present anti-discrimination laws "do not address the deeply-rooted historical bias in compensation systems nor the problem of occupational segregation."¹⁸ It is unlikely that the courts on their own will ever accept comparable

¹¹ Elaine Sorenson, *Measuring the Pay Disparity Between Typically Female Occupations and Other Jobs: A Bivariate Selectivity Approach*, 42 INDUS. & LAB. REL. REV. 624, 625 (1989).

¹² Heidi I. Hartmann, *supra* note 6 (stating that 48% of women and 71% of men were in same-sex dominated jobs in 1980).

¹³ Sorenson, *supra* note 11, at 625 (approximately 15% less).

¹⁴ Robert M. Tobias, *supra* note 3.

¹⁵ Heidi I. Hartmann, *supra* note 6 (stating that to desegregate jobs, 53% of all men or women would have to switch jobs).

¹⁶ *Hearing*, *supra* note 1 (testimony of Michele Leber, Treasurer, National Committee on Pay Equity) ("Only by comparing the skills, effort, responsibility, and working conditions of female and male dominated jobs, and paying equal wages for jobs equivalent in those factors, will continued progress against wage discrimination be made.").

¹⁷ *Id.* (statement of Representative Eleanor Holmes Norton); *see Power v. Barry County*, 539 F. Supp. 721, 722 (W.D. Mich. 1982) ("[M]ere claim of unequal pay for comparable work does not state a valid claim under either Title VII or the Equal Pay Act.").

¹⁸ *Hearing*, *supra* note 1 (testimony of Michele Leber, Treasurer, National Committee on Pay Equity).

worth as a viable theory sufficient to enforce a Title VII or Equal Pay Act claim.¹⁹

Critics insist that not only does comparable worth not fit well into existing analytical models used by courts to determine sexual discrimination, but that it also provides no standards by which the judiciary can rule on the merits.²⁰ Courts assert that it is not the responsibility of the judicial system to draw comparisons of the relative worth of different jobs.²¹ In frustration with the reluctance of the courts, many comparable worth advocates have taken their fight to the state legislatures.²² It seems a futile effort to expect the Supreme Court ever to accept, without further guidance from Congress, the concept of comparable worth.

To see the need for comparable worth legislation, we must first look at where the present anti-discrimination laws fall short of the goal of equal pay. Part I of this Note focuses on the Equal Pay Act and the advancements and limitations this legislation has made upon wage discrimination claims.²³ Part II analyzes the scope of the comparable worth theory under Title VII with regard to disparate treatment and disparate impact claims.²⁴ Finally, Part III discusses the proposed amendments to the Equal Pay Act which would incorporate the comparable worth theory into law and any arguments that might be presented against and in favor of comparable worth.²⁵ This Note concludes that comparable worth is a practical method to lessen and eventually eliminate the discriminating gap in wages between women and men. However, the new and direct legislation proposed in the Fair Pay

¹⁹ Mack A. Player, *Exorcising the Bugaboo of "Comparable Worth": Disparate Treatment Analysis of Compensation Differences Under Title VII*, 41 ALA. L. REV. 321, 322 (1990) (stating that, regardless of merit, comparable worth is insufficient for a Title VII claim).

²⁰ *Id.* at 367.

²¹ Susan Kelley-Claybrook, *The Comparable Worth Dilemma: Are Apples and Oranges Ripe for Comparison?*, 37 BAYLOR L. REV. 227, 238-47 (1985) (describing cases from the Fifth and Ninth Circuits and the District Courts of Michigan and Connecticut, which state that courts have been unwilling to compare dissimilar jobs. The author also cites cases from the District Courts of Wisconsin and Pennsylvania where the theory has received only a limited acceptance).

²² *Id.* at 251. Although the author is aware of the action taken by the states in enacting comparable worth legislation, this Note focuses on federal action.

²³ See *infra* notes 27-45 and accompanying text.

²⁴ See *infra* notes 46-97 and accompanying text.

²⁵ See *infra* notes 98-155 and accompanying text.

Act is necessary, if not vital, in order for the concept of comparable worth to receive legal recognition in our administrative and judiciary systems.²⁶

I. THE EQUAL PAY ACT OF 1963

The Equal Pay Act²⁷ was the first anti-discrimination legislation to “[bring] with it the vision of an end to unequal pay” between the sexes.²⁸ The legislative history indicates that the original versions of the Equal Pay Act, based on the policies of the National War Board during World War II, were intended to encompass equal pay for equivalent jobs.²⁹ Many legislative proposals used the National War Board’s policy as a model for anti-discrimination legislation, but it was not until the early 1960s that Congress began to get serious about the passage of an Equal Pay Act.³⁰ Limiting the Equal Pay Act to only prohibiting unequal pay for equal work was an alternative proposal put before the legislature, primarily to release the employer from the burden of making job comparisons.³¹ Congress also ultimately rejected the comparable worth standard in favor of the “equal pay for equal work” standard.³²

²⁶ See *infra* notes 156-60 and accompanying text.

²⁷ 29 U.S.C. § 206(d) (1988). The Equal Pay Act reads in pertinent part: (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

²⁸ *Hearing, supra* note 1 (statement of Judith L. Lichtman, President, Women’s Legal Defense Fund).

²⁹ *Power v. Barry County*, 539 F. Supp. 721, 724 (W.D. Mich. 1982).

³⁰ *Id.*

³¹ *Thompson v. Sawyer*, 678 F.2d. 257, 271 (D.C. Cir. 1982).

³² *County of Wash. v. Gunther*, 452 U.S. 161, 184 (1981) (Rehnquist, J., dissenting).

In adopting this standard, Congress expressly rejected comparable worth.³³ Representative Charles E. Goodell expressed Congress' intent to narrow the scope of the Equal Pay Act:

I think it is important that we have clear legislative history at this point. *Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept.* We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, that they would be very much alike or closely related to each other.

We do not expect the Labor Department to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so that they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal.³⁴

The Equal Pay Act has only had a limited effect in remedying wage disparities, primarily due to the strict limitations placed upon it at its inception. The Equal Pay Act prohibits unequal pay for "substantially equal" work.³⁵ While not mandating that the work be identical, this standard falls short of a comparable work standard.³⁶ Equal work is determined by comparing the jobs to determine whether they both require equal skill, effort, and responsibility under similar working conditions.³⁷ These determinations are made, not based upon a job title or a description of a particular occupation, but on "actual job performance and content."³⁸ Even though courts have implied that dissimilar jobs could be

³³ *Id.* Congress felt that a comparable worth standard would involve the Court in making subjective assessments concerning the worth of dissimilar jobs. The Court also expressed concern over the effect of this doctrine on the law of supply and demand. *Id.*

³⁴ *Id.* at 187 (citing 109 CONG. REC. 9197 (1963)).

³⁵ *Thompson*, 678 F.2d at 271.

³⁶ *Id.* (stating that "substantially equal" falls between "exactly alike" and "comparable").

³⁷ 29 U.S.C. § 206(d) (1988); *Spaulding v. University of Wash.*, 740 F.2d 686, 697 (9th Cir.) ("A plaintiff may show that the jobs are substantially equal, not necessarily that they are identical."), *cert. denied*, 469 U.S. 1036 (1984).

³⁸ *Spaulding*, 740 F.2d at 697 (stating that actual job performance, rather than description is determinative); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 592 (11th Cir. 1994) (stating that only the skills which are needed for the job are evaluated under the Equal Pay Act), *cert. denied*, 63 U.S.L.W. 3268 (U.S. No. 94-123).

compared to a certain extent,³⁹ actual decisions have strictly construed what constitutes equal work. In *EEOC v. Madison Community Unit School District No. 12*, the Seventh Circuit held that high school coaches of male and female teams of the same sport could be considered substantially equal, but rejected the notion that coaches of different sports were equal under the guidelines of the Equal Pay Act despite the fact that the duties were similar.⁴⁰ The court also gave examples of other cases where the definition of equal work was narrowly drawn.⁴¹ The result of such decisions has been to limit severely the number of situations where the Equal Pay Act can provide relief.

There is no doubt, due to the legislative history and the courts' decisions, that a claim under the comparable worth doctrine is clearly and specifically repudiated as a valid, actionable claim under the Equal Pay Act.⁴² Thus, women in sex-segregated jobs who are being paid unequal wages have no available remedy under the Equal Pay Act. The Equal Pay Act does not prohibit an employer from discriminating against women by paying them lower wages when they are performing jobs of equal or greater skill than their male counterparts.⁴³ The Equal Pay Act does not

³⁹ *EEOC v. Madison Community Unit Sch. Dist. No. 12*, 818 F.2d 577, 580 (7th Cir. 1987) (implying that some comparisons of different jobs are possible).

⁴⁰ *Id.* at 583-84. The court, however, compared its decision to that in *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985), which held that "teaching different subjects, and teaching physical education but with different coaching duties — intramural athletics program versus intercollegiate basketball team — [are] equal within meaning of Act" and *Thompson v. Sawyer*, 678 F.2d 257 (D.C. Cir. 1982), which held that jobs in the same bindery were substantially equal even though performed on different machines. *Madison*, 818 F.2d at 582-83. Clearly the decision in *Madison* cannot be reconciled with the rulings in *Brock* and *Thompson*.

⁴¹ *Madison*, 818 F.2d at 582.

⁴² *County of Wash. v. Gunther*, 452 U.S. 161, 186 (1981) (Rehnquist, J., dissenting); see *Madison*, 818 F.2d at 580 (stating that the Equal Pay Act is "not a general mandate of sex neutral compensation"); *Power v. Barry County*, 539 F. Supp. 721, 725 (W.D. Mich. 1982) (stating that the Equal Pay Act addressed the issue of equal pay for equal work and was not "to be invoked to mandate equality of pay for jobs of different content").

⁴³ *Madison*, 818 F.2d at 580 ("The working conditions of a janitor are different from those of a secretary, and so are the skills and responsibilities of the two jobs. The [Equal Pay] Act does not prohibit paying different wages even if the result is to pay a woman less than a man and by doing so 'underpay' her

even extend to job duties which are unequal due to gender motivation.⁴⁴ Therefore, if an employer's reason for giving different duties to male and female employees is based upon sex, then a woman has no claim under the Equal Pay Act because the jobs performed are not substantially equal.⁴⁵ All of these distinctions serve to make the Equal Pay Act useless as a tool for asserting a comparable worth theory of relief.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

In terms of sex discrimination, Title VII of the Civil Rights Act⁴⁶ gives a broader basis under which claimants can obtain relief, and, as a result, plaintiffs have tried to have the comparable worth theory judicially accepted under this legislation. Originally, Title VII was not meant to address sex discrimination at all.⁴⁷ The provisions relating to sex discrimination were added to the bill just two days before the final vote on Title VII took place.⁴⁸ As a result, there is no explicit discussion as to whether the boundaries of compensation are limited to equal work or whether it encompasses comparable worth as well.⁴⁹ It is a theory of some legislative scholars that the inclusion of sex discrimination within the provisions of Title VII was an attempt by the proposing Congressman to defeat the bill. However, the strategy failed and the bill was adopted into law.⁵⁰

. . . .").

⁴⁴ Player, *supra* note 19, at 329.

⁴⁵ *Id.*

⁴⁶ 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII reads in pertinent part: "(a) It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"

⁴⁷ *Power v. Barry County*, 539 F. Supp. 721, 725 (W.D. Mich. 1982) (stating that sex discrimination did not play an important role in hearings concerning Title VII).

⁴⁸ *County of Wash. v. Gunther*, 452 U.S. 161, 172 (1981).

⁴⁹ *American Fed'n of State, County, and Mun. Employees v. Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985) [hereinafter *AFSCME v. Washington*] ("The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity." (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976))); *accord Power*, 539 F. Supp. at 725.

⁵⁰ *Power*, 539 F. Supp. at 725.

It was under the prohibitions of Title VII that its advocates hoped the courts would recognize comparable worth as a legal theory, specifically in view of the United States Supreme Court's decision in *County of Washington v. Gunther*.⁵¹ In *Gunther*, the female guards at the women's section of the county jail brought suit against the county of Washington, Oregon, under Title VII, asserting that they were paid unequal wages for work equivalent to that performed by their male counterparts in the men's section of the facility. Moreover, the plaintiffs asserted that the differential was caused by intentional sex discrimination.⁵² The female guards put forth a survey conducted by the county of outside markets and the relative worth of each job as proof of intentional discrimination.⁵³ The plaintiffs showed that even though the survey indicated that the duties of the female guards were considered to be equivalent to ninety-five percent of the duties performed by the male guards, the plaintiffs were only paid seventy percent of the wages of their male counterparts.⁵⁴ While emphasizing that its decision was not based on comparable worth,⁵⁵ the Court nevertheless held that the female guards' claims were not barred simply because they performed work which was not equal to that of the male guards.⁵⁶

The Supreme Court based its decision upon a reinterpretation of the Bennett Amendment,⁵⁷ which was added to Title VII to clarify the relationship between Title VII and the Equal Pay Act, which was passed a year earlier.⁵⁸ Prior to the Court's decision in *Gunther*, the Bennett Amendment had been interpreted to incorporate not only the four affirmative defenses — seniority, merit, productivity, and any factor other than sex — mandated by the Equal Pay Act, but also the equal work standard.⁵⁹ After reviewing the legislative history, the Court determined

⁵¹ 452 U.S. 161 (1981).

⁵² *Id.* at 164.

⁵³ *Id.* at 165.

⁵⁴ *Id.* at 180.

⁵⁵ *Id.* at 166.

⁵⁶ *Id.* at 181.

⁵⁷ 42 U.S.C. § 2000e-2(h) (1988). The Bennett Amendment states in part:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [§] 206(d) of Title 29 [The Equal Pay Act].

⁵⁸ *County of Wash. v. Gunther*, 452 U.S. 161, 173 (1981).

⁵⁹ *E.g.*, *Lemons v. City and County of Denver*, 620 F.2d 228, 229 (10th

in *Gunther* that the Bennett Amendment only incorporated the defenses and not the equal work standard of the Equal Pay Act.⁶⁰

Although the Court expressly rejected the comparable worth argument and emphasized the narrowness of the question involved at the outset, advocates felt that the decision in *Gunther* would open the doors to judicial acceptance of comparable worth.⁶¹ It was the enactment of Title VII which led to the theory of comparable worth because it allowed a broader statutory scheme for women to recover for wage discrimination.⁶² However, courts have consistently refused to acknowledge the doctrine of comparable worth as a viable legal theory under both disparate treatment and disparate impact claims.⁶³ While disparate treatment cases require direct or circumstantial proof of discriminatory motives, the disparate impact theory only requires that the practice have a detrimental effect on a group in the workforce.⁶⁴ Neither has been ultimately successful in gaining judicial acceptance of the comparable worth theory.

A. Disparate Treatment

The plaintiffs in *Gunther* pursued their claim under the disparate treatment theory.⁶⁵ It is only through the disparate treatment theory that any plaintiff has been able to prevail using evidence of a comparable worth study as a basis for their claim.⁶⁶ Even here, the decision in *Gunther* has served to limit severely a plaintiff's chances for relief under

Cir.) (stating that the Bennett Amendment applies the equal work concept to Title VII as it applies to the Equal Pay Act), *cert. denied*, 449 U.S. 888 (1980); *Christensen v. Iowa*, 563 F.2d 353, 357 (8th Cir. 1977) (Miller, J., concurring) (stating that an equal work showing was required under Title VII).

⁶⁰ *Gunther*, 452 U.S. at 168.

⁶¹ Robert L. Bragg, *Comparable Worth and Title VII: The Case Against Disparate Impact Analysis*, 16 PAC. L.J. 833, 839 ("The *Gunther* holding thus authorizes suits comparing jobs to be brought under Title VII. This result is most advantageous to a comparable worth plaintiff, since the jobs being compared need not be substantially similar as required by the Equal Pay Act.").

⁶² *Duroska*, *supra* note 7, at 258-59 (stating that the use of Title VII in this context is important due to the limitations imposed by the Equal Pay Act).

⁶³ *Robert M. Tobias*, *supra* note 3.

⁶⁴ *Spaulding v. University of Wash.*, 740 F.2d 686, 700 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

⁶⁵ *County of Wash. v. Gunther*, 452 U.S. 161, 166 (1981).

⁶⁶ *Bragg*, *supra* note 61, at 833-34, 848-50 (stating that the only permissible theory under Title VII is discriminatory intent).

a theory of comparable worth. Courts have consistently ruled that a comparable worth study, by itself, is not sufficient evidence to provide a basis for a Title VII claim.⁶⁷ The courts only allow the comparable worth theory to be relevant in a Title VII claim when it can be used to “infer a discriminatory animus”⁶⁸ from circumstantial evidence.⁶⁹ It is still the plaintiff’s burden to prove discriminatory intent to make out a case under disparate treatment; evidence of comparable worth can be used towards proving such intent.⁷⁰

The courts, however, have not been very amenable to such evidence in rendering their decisions on this type of claim. The failure to implement a comparable worth study once it has been commissioned is not sufficient to establish a violation under Title VII.⁷¹ The courts reason that to do so would only serve to deter employers from commissioning such studies, therefore penalizing them for their efforts rather than commending them.⁷² It would also deter those states who have yet to commission such a study from doing so.⁷³ Comparable worth is relevant only when the employer is “forced to declare his intention[]” to purposefully discriminate on the basis of sex.⁷⁴ The

⁶⁷ *EEOC v. Sears, Roebuck, & Co.*, 839 F.2d 302, 341 (7th Cir. 1988) (stating that job evaluation studies alone are insufficient to prove discriminatory intent); *accord* *Manuel v. WSBT, Inc.*, 706 F. Supp. 654, 659 (N.D. Ind. 1988) (stating that an employer’s failure to implement a comparable worth study did not support a finding of discriminatory intent).

⁶⁸ *Spaulding*, 740 F.2d at 701.

⁶⁹ *AFSCME v. Washington*, 770 F.2d 1401, 1406 (9th Cir. 1985) (“[T]he necessary discriminatory animus may be inferred from circumstantial evidence.”).

⁷⁰ *Spaulding*, 740 F.2d at 704 (“The validity or usefulness of such comparative statistics therefore rests directly on their capacity to single out the factors that convert merely different treatment into unjustified discriminatory treatment.”).

⁷¹ *AFSCME*, 770 F.2d at 1408 (“Given the scope of the alleged intentional act, and given the attempt to show the core principle of the State’s market-based compensation system was adopted or maintained with a discriminatory purpose, more is required to support the finding of liability than these isolated acts, which had only an indirect relation to the compensation principle itself.”).

⁷² *Id.*

⁷³ *Id.* (citing *American Nurses’ Ass’n v. Illinois*, 606 F. Supp 1313, 1317-18 (N.D. Ill. 1985), *rev’d on other grounds*, 783 F.2d 716 (7th Cir. 1986)).

⁷⁴ *American Nurses’ Ass’n*, 783 F.2d at 721 (stating that the only relevance of a comparable worth study is to prove purposeful sexual discrimination); *accord* *EEOC v. Sears, Roebuck, & Co.*, 839 F.2d 302, 342 (7th Cir. 1988) (“[T]he key distinction is whether the implementation of the compensation

problem in *Gunther* was the fact that the State had only implemented its comparable worth study in male job categories while failing to enact it in female job categories.⁷⁵

B. Disparate Impact

While plaintiffs have achieved limited success under the disparate treatment theory, they have had no success under the disparate impact theory. While making a case under disparate impact is possible using the comparable worth theory,⁷⁶ the fit is not close enough for courts to recognize it as a legitimate claim under Title VII.⁷⁷ Disparate impact theory has been "confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process."⁷⁸ A good example would be where a female plaintiff would claim that a specific requirement, although gender-neutral on its face, served to eliminate women from being able to comply and effectively precluded them from certain jobs (i.e., a height and/or weight requirement).⁷⁹ Thus far, the courts have been unable to make the analogy under comparable worth.⁸⁰ The courts further assert that to extend Title VII to comparable worth claims under disparate impact would "plunge [them] into uncharted and treacherous areas."⁸¹

The most severe and deadliest blow to the comparable worth theory is the Ninth Circuit's decision in *American Federation of State, County, and Municipal Employees v. Washington* ("AFSCME").⁸² The district

program in response to a comparable worth study reflects discriminatory intent.").

⁷⁵ *American Nurses' Ass'n*, 783 F.2d at 721.

⁷⁶ Duroska, *supra* note 7, at 269.

⁷⁷ *Player*, *supra* note 19, at 368 (stating that without some additions or amendments, comparable worth does not fit well into existing analytical models because "similar situation/dissimilar treatment is the direct application of one well-established model of inferring motivation from circumstantial evidence").

⁷⁸ *AFSCME v. Washington*, 770 F.2d 1401, 1405 (9th Cir. 1985).

⁷⁹ *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321 (1977).

⁸⁰ *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986) (stating that it is not apparent what the analogy of comparable worth would be to an exclusionary job qualification and furthermore that an interpretation of the Bennett Amendment of Title VII would limit its scope to those claims involving disparate treatment).

⁸¹ *Spaulding v. University of Wash.*, 740 F.2d 686, 706 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

⁸² 770 F.2d 1401 (9th Cir. 1985).

court found that the plaintiffs had successfully proven their comparable worth claim under the disparate impact analysis.⁸³ Thus, the advocates of comparable worth gained new hope in their quest for equal pay, as this was the first case to acknowledge the use of a comparable worth analysis under Title VII.⁸⁴ However, on appeal, the Ninth Circuit determined that the precedents did not support the conclusion that the disparate impact analysis could be employed in this case.⁸⁵ The court specified that disparate impact analysis should be confined to those situations in which it had been previously employed.⁸⁶ In rejecting the use of disparate impact analysis, the Ninth Circuit stated:

The instant case does not involve an employment practice that yields to disparate impact analysis. As we noted in an earlier case, the decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis.⁸⁷

It was the State of Washington's reliance on the market system in determining wages that was a primary factor in the court's decision against the plaintiff's disparate impact claim.⁸⁸ The market based system of wages has been a factor that the courts have relied on heavily in their refusal to proceed with the comparable worth theory under Title VII.⁸⁹

⁸³ *Id.* at 1403.

⁸⁴ Joseph P. Loudon & Timothy D. Loudon, *Applying Disparate Impact to Title VII Comparable Worth Claims: An Incomparable Task*, 61 IND. L.J. 165, 174 (1985-86) ("Prior to its reversal, AFSCME represented the only successful attempt by a plaintiff to apply disparate impact analysis to a sex-based comparable worth claim.").

⁸⁵ *AFSCME*, 770 F.2d at 1405; *accord Spaulding*, 740 F.2d at 706 ("[T]he law does not go so far as to allow a prima facie case to be constructed by showing disparate impact.").

⁸⁶ *AFSCME*, 770 F.2d at 1406.

⁸⁷ *Id.* (citing *Spaulding*, 740 F.2d at 708) (stating that the disparate impact model cannot be usefully transferred to the theory of comparable worth).

⁸⁸ *Id.* (stating that the plaintiff's attempt to infer discriminatory motive from Washington's participation in the market system failed).

⁸⁹ *See, e.g., Lemons v. City and County of Denver*, 620 F.2d 228, 229 (10th Cir.) ("We do not interpret Title VII as requiring an employer to ignore the market in setting wage rate for genuinely different work classifications." (quoting *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977))), *cert. denied*, 449 U.S. 888 (1980).

Courts have stated that even if the employer knows of the wage disparity, they do not violate Title VII by paying male and female occupations at their market rates.⁹⁰ "Neither law nor logic deems the free market system a suspect enterprise."⁹¹ The court reasoned that since the State of Washington "did not create the market disparity," there is insufficient proof to show that they were discriminatorily motivated in their use of market wages to set salary.⁹² Although it is within Washington's power to enact a comparable worth plan, "Title VII does not obligate" them to do so.⁹³ The court in *AFSCME* also noted that value was only one aspect influencing the wage rate, and other considerations such as, "the availability of workers" and "the effectiveness of collective bargaining," might also influence salary.⁹⁴ With its finding that the laws of supply and demand in the free market system effectively rebut Title VII,⁹⁵ the courts provided employers with a solid defense against comparable worth claims under Title VII which would be nearly impossible to overcome.

After twelve years of decisions refuting the comparable worth theory under Title VII, it is unlikely that the Supreme Court will now embrace the concept.⁹⁶ Courts are adamant in refusing to acknowledge comparable worth, and it will take nothing less than new legislation to incorporate comparable worth into an actionable claim and thereby afford relief to those being underpaid in sex-segregated jobs.⁹⁷

⁹⁰ *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (stating that knowledge of a disparity is not the same as causing or maintaining it).

⁹¹ *AFSCME*, 770 F.2d at 1407.

⁹² *Id.* at 1406.

⁹³ *Id.* at 1407.

⁹⁴ *Id.*

⁹⁵ *Id.* ("We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market.").

⁹⁶ *Testimony on Fair Pay Act July 21, 1994: Statement by American Federation of Government Employees, AFL-CIO Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service Comm. and the Subcomm. on Select Education and Civil Rights of the House Education and Labor Comm.*, 103d Cong., 2d Sess. (1994), available in LEXIS, Legis Library, Cngtst File (statement of John Sturdivant, National President, American Federation of Government Employees).

⁹⁷ *Lemons v. City and County of Denver*, 620 F.2d 228, 229 (10th Cir.) ("Plaintiffs are not seeking equality of opportunity in their skills as contemplated by Title VII, . . . but instead would cross job description lines into areas of

III. THE FAIR PAY ACT OF 1994

On July 21, 1994, Representative Eleanor Holmes Norton (D-D.C.) introduced the Fair Pay Act of 1994⁹⁸ as an amendment to the Equal Pay Act.⁹⁹ In its findings in support of the proposed amendment, Congress found that wage differentials exist in sex-segregated jobs and commercial industries and that the existence of such differentials:

(A) depresses wages and living standards for employees necessary for their health and efficiency;

(B) prevents the maximum utilization of the available labor resources;

(C) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(D) burdens commerce and the free flow of goods in commerce; and

(E) constitutes an unfair method of competition.¹⁰⁰

To remedy such wage differentials, the Fair Pay Act seeks to prohibit any employer from discriminating against employees of the opposite sex by paying lower wages to one group of employees than it pays to a group of the opposite sex for equivalent jobs.¹⁰¹ The Fair Pay Act defines the term "equivalent jobs" to mean "jobs that may be dissimilar, but whose

entirely different skills. This would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it."), *cert. denied*, 449 U.S. 888 (1980); *cf.* *Power v. Barry County*, 539 F. Supp. 721, 726 (W.D. Mich. 1982) ("Nor is there convincing evidence that Congress intended to make such a theory available to those seeking redress for real and imaginary wage inequalities.").

⁹⁸ H.R. 4803, 103d Cong., 2d Sess. (1994). The Fair Pay Act amends 29 U.S.C. § 206 (1988) by adding the following:

(g)(1)(A) No employer having employees subject to any provisions of this section shall discriminate between its employees on the basis of sex, race, or national origin by paying wages to employees or groups of employees at a rate less than the rate at which the employer pays wages to employees or groups of employees of the opposite sex or different race or national origin for work in equivalent jobs, except where such payment is made pursuant to a seniority system, a merit system, or a system which measures earnings by quantity or quality of production.

⁹⁹ 29 U.S.C. § 206(d) (1988).

¹⁰⁰ H.R. 4803, 103d Cong., 2d Sess. (1994).

¹⁰¹ *Id.* Although the Fair Pay Act of 1994 also encompasses discrimination based upon race, the author intends to focus solely upon the gender issue.

requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions."¹⁰² In contrast to the Equal Pay Act, the Fair Pay Act allows a comparison between dissimilar jobs which have been evaluated as being of equal worth.¹⁰³

The Fair Pay Act also provides important protections to those employees who may choose to bring a claim against an employer under the Fair Pay Act. The Fair Pay Act mandates that an employer may not lower the wages of another employee to comply with its provisions.¹⁰⁴ This not only protects the claimant, but also those employees in the comparative job category, from unscrupulous wage practices by an employer.

The Fair Pay Act also prohibits an employer from discriminating against any employee who brings a claim or participates in any manner in a proceeding brought under the Act.¹⁰⁵ These prohibitions extend not only to the discharge of employment, but also to any form of harassment, including threats, coercion, or intimidation experienced by an employee in pursuing their own claim or in assisting and encouraging another employee's claim.¹⁰⁶ Passage of the Fair Pay Act would greatly increase the remedies available to women to combat wage disparity while at the same time providing sufficient protection against retaliation for pursuing these claims.

A. Criticism and Support for Comparable Worth

It is obvious from the courts' reluctance to recognize comparable worth that the passage of the Fair Pay Act is necessary. However, it will

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* Congress proposed to amend 29 U.S.C. § 215(a) (1988) by making it a violation:

(6) to discriminate against any individual because such individual has opposed any act or practice made unlawful by section 6(g) or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under section 6(g); or

(7) to discharge or in any other manner discriminate against, coerce, intimidate, threaten, or interfere with any employee or any other person because the employee inquired about, disclosed, compared, or otherwise discussed the employee's wages or the wages of any other employee, or because the employee exercised, enjoyed, aided, or encouraged any other person to exercise or enjoy any right granted or protected by section 6(g).

¹⁰⁶ H.R. 4803, 103d Cong., 2d Sess. (1994).

not be easy to overcome the opposition, who consider the concept nonviable in a legal setting. Job evaluation studies which are conducted by researchers to determine the comparable worth of dissimilar jobs are usually based upon a point system.¹⁰⁷ Factors are weighted based on the following: “1) knowledge; 2) mental and physical demands; and 3) responsibility.”¹⁰⁸ Some studies also add working conditions in their analysis.¹⁰⁹

An example of such a system is the Willis Study. This study was used by the State of Washington and was described by the court in *AFSCME v. Washington*:¹¹⁰

Comparable worth was calculated by evaluating jobs under four criteria: knowledge and skills, mental demand, accountability, and working conditions. A maximum number of points was allotted to each category: 280 for knowledge and skills, 140 for physical demands, 160 for accountability, and 20 for working conditions. Every job was assigned a numerical value under each of the four criteria.¹¹¹

The weighted factors are combined to arrive at a total score to determine job worth.¹¹²

The Willis Study is not the only method for evaluating dissimilar jobs in an establishment; on the contrary, employers have a selection from which to choose. Another example is the Hay Guide Chart-Profile Method utilized by Sears and described in *EEOC v. Sears, Roebuck, & Co.*¹¹³ The methods are similar to those used in the Willis Study in that

¹⁰⁷ Bragg, *supra* note 61, at 844.
¹⁰⁸ *Id.*
¹⁰⁹ Heidi I. Hartmann, *supra* note 6.
¹¹⁰ 770 F.2d 1401 (9th Cir. 1985).
¹¹¹ *Id.* at 1403.
¹¹² Heidi I. Hartmann, *supra* note 6. One of Hartmann’s examples of such a comparison is between a delivery truck driver and a clerk typist.

	SUBSTANTIVE COMPLEXITY	MOTOR SKILLS	PHYSICAL DEMANDS	WORKING CONDITIONS	TOTAL
<i>Delivery</i>					
Truck Driver:	50	30	30	20	130
Clerk Typist:	95	20	10	5	130

Id.
¹¹³ 839 F.2d 302, 343-44 (7th Cir. 1988).

the Hay method assigns evaluation points for "know-how, problem solving, and accountability" required in the average duties for each position.¹¹⁴

1. *Cost Effectiveness*

Opponents of comparable worth present many arguments against the use of these job evaluation studies. Some opponents of the comparable worth theory predict that utilization of the theory will cause a substantial decline in employment due to employers having to pay higher wages to correct inequity.¹¹⁵ Critics suggest that higher wages will cause employers to hire fewer people and will therefore shrink the job market for both men and women.¹¹⁶ These same arguments, however, were presented in opposition of the Equal Pay Act of 1963.¹¹⁷ They were as unfounded then as they are now.

Supporters insist that there is a way to implement the program in a cost-effective way. At present, twenty-four states have undertaken comparable worth studies and twenty states have taken the further step of adjusting upward the wages of workers in the lower paying female jobs.¹¹⁸ Most states have been able to do this by expending a minimal percentage of their payroll budget and have closed their wage gap by a significant percentage.¹¹⁹ "In many of these cases, minimal costs have resulted in significant gains towards the eradication of wage discrimination."¹²⁰ Studies have also shown that there has been no significant effect on employment growth in those states which have implemented comparable worth.¹²¹ It is unrealistic to assume that the implementation

¹¹⁴ *Id.* at 344.

¹¹⁵ *Heidi I. Hartmann, supra* note 6.

¹¹⁶ *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 719-20 (7th Cir. 1986).

¹¹⁷ *Heidi I. Hartmann, supra* note 6 ("This argument was heard during the debates about the Equal Pay Act of 1963 . . . but statistical analyses have not found any disemployment effects of these earlier laws.").

¹¹⁸ *Hearing, supra* note 1 (testimony of Michele Leber, Treasurer, National Committee on Pay Equity).

¹¹⁹ *Id.* (testimony of Michele Leber, Treasurer, National Committee on Pay Equity).

¹²⁰ *Id.* (testimony of Michele Leber, Treasurer, National Committee on Pay Equity).

¹²¹ *Heidi I. Hartmann, supra* note 6 (stating that most of the states that have implemented pay equity show virtually no effect on employment growth; those states that have shown a negative impact implemented fewer controls to counteract other changes that might have been occurring).

of such a program can be realized without the expenditure of some money. However, it is equally unrealistic to deny such expenditures if they can effectively eradicate wage discrimination in the United States. To begrudge women the pay they are entitled to simply because of the extra cost is to base our entire system of wages upon sex discrimination.¹²²

Comparable worth is not as radical a concept as the United States courts judge it to be; other countries have already enacted legislation to encompass comparable worth claims.¹²³ Interestingly, the United States lags far behind the other countries of the world in its wage disparities between men and women.¹²⁴ The example of a comparable worth system that is closest to home and involves perhaps the most comprehensive legislation is the Pay Equity Act of Canada.¹²⁵ The purpose of the Pay Equity Act is to overcome discrimination based on the gender of employees in "female job classes," and, therefore, has "confined its attention to that part of the wage gap produced by the underevaluation of women's work."¹²⁶

The Pay Equity Act mandates that all employers with 100 or more employees conduct a job evaluation study to determine whether wage disparity exists within their establishment between male and female dominated jobs of equal value,¹²⁷ and to post a pay equity plan describing the adjustments to be made and a timetable for correcting these

¹²² Accord Aileen McColgan, *Legislating Equal Pay? Lessons From Canada*, 22 INDUS. L.J. 269, 283 (1993) ("If one were to honestly believe economists and employers who cry out that equal value will be disastrous for the economy, causing inflation and wide-spread unemployment, then it appears that the ongoing health of the Canadian economy depends mainly on the exploitation of working women . . . I cannot think of any other area of human rights legislation where it is a legitimate point of discussion to debate whether society can afford the costs of eliminating discrimination." (quoting Mary Cornish, *Equal Pay for Work of Equal Value Conference* (Mar. 18-19, 1986))).

¹²³ See *id.* (discussing relevant legislation in the United Kingdom and Canada).

¹²⁴ Heidi I. Hartmann, *supra* note 6. In countries like Australia, Denmark, France, New Zealand, Norway, and Sweden, women are paid 80% to 90% of what their male counterparts receive. In the United States women receive 70% of what men are paid. *Id.*

¹²⁵ Pay Equity Act, R.S.O., ch. 34 (1988) (Can.).

¹²⁶ McColgan, *supra* note 122, at 272-73.

¹²⁷ Nancy K. Kubasek et al., *Comparable Worth in Ontario: Lessons the United States Can Learn*, 17 HARV. WOMEN'S L.J. 103, 110 (1994).

wage disparities.¹²⁸ Smaller companies with less than a hundred employees are still required to correct wage discrepancies, however, the posting of a pay equity plan is optional.¹²⁹ The pay equity plans are posted so that all employees are able to review them.¹³⁰ The selection of an evaluation system is entirely within the discretion of the employer as long as it is gender neutral and evaluates the work performed on the basis of four criteria — skill, effort, responsibility, and work conditions.¹³¹ A “minimum of one percent of the[] payroll” must be spent each year to correct the wage disparities found by the job evaluation studies.¹³²

The proposed Fair Pay Act is similar to the legislation in Canada, but its requirements are not as stringent nor as detailed, leaving that aspect of its effectiveness to an administrative agency. While the Fair Pay Act and the Pay Equity Act both mandate the same criteria be used in evaluating the relative worth of dissimilar jobs,¹³³ the Fair Pay Act contains no specific guidelines on which employers would be required to file evaluation studies. The power to regulate the reporting and filing of evaluation reports is left in the hands of the Equal Employment Opportunity Commission (“EEOC”).¹³⁴ “The [EEOC] shall issue rules and regulations prescribing the form and content of reports required to be filed . . . and such other reasonable rules and regulations as it may find necessary to prevent the circumvention or evasion of such reporting requirements.”¹³⁵ The EEOC also has the power to allow a smaller employer to file a simplified report instead of a full evaluation.¹³⁶ As in Canada, the reports filed by an employer with the EEOC would be available to employees and the public.¹³⁷

The Pay Equity Act is not without its shortcomings, and scholars have cited “gaps in its coverage.”¹³⁸ However, Canada remains commit-

¹²⁸ McColgan, *supra* note 122, at 275.

¹²⁹ Kubasek et al., *supra* note 127, at 111.

¹³⁰ *Id.* at 112.

¹³¹ McColgan, *supra* note 122, at 274 (stating that the “choice of job comparison system [sic] is a matter of managerial prerogative subject only to the Act’s requirement[s]”).

¹³² Kubasek et al., *supra* note 127, at 111.

¹³³ See *supra* notes 127-32 and accompanying text.

¹³⁴ H.R. 4803, 103d Cong., 2d Sess. (1994).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ McColgan, *supra* note 122, at 281 (citing the lack of a “definition of pay

ted to the legislation and has amended its Act in an effort to strengthen the statute's ability to remedy wage disparity.¹³⁹ Several lessons can be learned from Canada's legislation and experience in their quest to provide relief to those in sex-segregated occupations. "One of the fundamental lessons from the Ontario experience is that a pay equity system can be imposed without major disruption if considerable foresight is applied."¹⁴⁰ Placing the specifics of the evaluations into the hands of the EEOC should render the Fair Pay Act more effective to manage and should make it easier to close whatever loopholes employers may discover in attempts to get around the Act's mandate.

Also of importance is the fact that the implementation of comparable worth theory in Canada has not caused any major problems in the Canadian economic system and has proven to be compatible with the market system already in place.¹⁴¹ The success Canada has had in effectively and smoothly implementing such legislation should provide ample evidence and encouragement that it is possible to duplicate such legislation in the United States with minimal or no upset to the economic and market systems already used in the workplace.

2. *Standard of Evaluation*

Other critics assert that the standard is "so subjective, so divorced from objective norms, that the concept provides no justiciable standard by which liability can be articulated."¹⁴² The courts have upheld this assertion.¹⁴³ Even the Supreme Court in *County of Washington v. Gunther* described comparable worth as a comparison of intrinsic worth.¹⁴⁴ Such a disparity will be evidenced by disagreements among experts concerning the relative value of the same factors.¹⁴⁵ The results

equity" and "the failure to provide any systematic supervision of employers").

¹³⁹ Kubasek et al., *supra* note 127, at 123.

¹⁴⁰ *Id.* at 130.

¹⁴¹ *Id.* at 131 ("For all its shortcomings, implementation of comparable worth in Ontario has not caused any major disruptions in the nation's economy.").

¹⁴² Player, *supra* note 19, at 366 n.170.

¹⁴³ *E.g.*, *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1134 (5th Cir. 1983) ("Plemer asks too much. She would have the courts make an essentially subjective assessment of the value of the differing duties and responsibilities of the positions . . . and then determine whether Plemer was paid less than the value of her position because she was female.").

¹⁴⁴ 452 U.S. 161, 166 (1981).

¹⁴⁵ Kelley-Claybrook, *supra* note 21, at 234 (citing *Lemons v. City and*

of the studies would be affected by the objectives of the evaluators. Sexism may cause such factors as "physical demands and working conditions" most commonly associated with male dominated professions to be assigned a greater weight than the "skill and responsibility" which are commonly predominant in female dominated occupations.¹⁴⁶ However, a study conducted to look for sexual discrimination might tend to overemphasize these factors.¹⁴⁷ Critics have emphasized the need to "protect" employers from unfair judgments against their compensation practices: "Ultimately, the fate of an employer still rests on the results of a job evaluation study. The employer can only hope that the results are not too badly skewed by subjective input."¹⁴⁸

Regardless of the fact that some disparities can be shown with different types of comparable worth studies, they all indicate the same thing: Individuals working in occupations that are traditionally female are earning significantly less than individuals working in traditionally male occupations.¹⁴⁹ Many opponents of comparable worth theory believe that employers should be able to continue to rely on market factors in determining the amount of salary which should be paid. However, a wage system based upon demand in the market is just as subjectively based as comparable worth. Because of the pervasive discrimination in the market, it cannot accurately reflect the relative value of traditionally female occupations.¹⁵⁰ By allowing employers to rely on the market to base wages is, in effect, to perpetuate the long history of discrimination which created the market in the first place.¹⁵¹

County of Denver, 17 Fair Empl. Prac. Cas. (BNA) 906, 907 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980)) (stating that one "could never find any two experts who would be in complete agreement" about the value of the jobs in the United States).

¹⁴⁶ Bragg, *supra* note 61, at 845.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 851.

¹⁴⁹ Sorenson, *supra* note 11, at 625.

¹⁵⁰ Spaulding v. University of Wash., 740 F.2d 686, 705 n.10 (9th Cir.) ("Comparable worth theorists have also attempted to argue that discriminatory practices in the labor market are ultimately inefficient because [they are] not job related. This, of course, can be said only based on the belief that the market is defective."), *cert. denied*, 469 U.S. 1036 (1984).

¹⁵¹ See American Nurses' Ass'n v. Illinois, 783 F.2d 716, 720 (7th Cir. 1986) (stating that advocates of comparable worth urge "that collective bargaining, public regulation of wages and hours, and the lack of information and mobility of some workers make the market model an inaccurate description of how

3. *Effect on Job Desegregation*

Other critics have rejected comparable worth as being detrimental to the equality of women in the workplace. It is argued that enacting comparable pay for comparable work would serve to enforce the segregation by sex which currently exists in the workforce by eliminating the incentive for women to leave female dominated occupations and integrate into those traditionally held by men.¹⁵² Phyllis Schafly, an attorney and staunch opponent of comparable worth, avers that such a policy would be detrimental to the equalization of women in the workforce:

After all, why would a woman want to be a telephone pole repair person, a highway ditch digger or a prison guard if she could get the same pay working in a carpeted climate controlled office? . . . Now I ask you: if you were a female secretary, would you switch to a job as

relative wages are determined and how they influence the choice of jobs.”).

¹⁵² Phyllis Schafly, *The Comparable Worth Debacle: Attempt to End Alleged Wage Disparities Creates More Problems Than It Solves*, L.A. DAILY J., June 29, 1990, at 6; *accord American Nurses' Ass'n*, 783 F.2d at 719-20. It is interesting that while the court in *American Nurses' Ass'n* considers comparable worth to be a detriment to the desegregation of the workforce, the court continues its analysis by determining that desegregation will cause a decline in the available number of jobs in the workforce. The court states:

If the movement should cause wages in traditionally men's jobs to be depressed below their market level and wages in traditionally women's jobs to be jacked above their market level, women will have less incentive to enter traditionally men's fields and more to enter traditionally women's fields. Analysis cannot stop there, because the change in relative wages will send men in the same direction: fewer men will enter the traditionally men's jobs, more the traditionally women's jobs. As a result there will be more room for women in traditionally men's jobs and at the same time fewer opportunities for women in traditionally women's jobs — especially since the number of those jobs will shrink as employers are induced by the higher wage to substitute capital for labor inputs (e.g., more word processors, fewer secretaries). Labor will be allocated less efficiently; men and women alike may be worse off.

American Nurses' Ass'n, 783 F.2d at 719-20. The court seems to view the implementation of the comparable worth theory as a no-win situation for both women and men.

prison guard at the same or slightly less pay just for the satisfaction of . . . moving women into "nontraditional" jobs?¹⁵³

Arguments such as these do not address the realities of the American workplace. First, not every woman wants to work in a traditionally male-dominated job as Ms. Schafly suggests. Instead, some women prefer to remain in their present occupation, female-dominated though it may be.¹⁵⁴ To follow Schafly's rationale would be to punish those women who desire to remain in their present female-dominated occupations by not affording them a way to ensure fair pay for the worth of their jobs. Second, the desegregation of the workforce is not an easy task to accomplish. To fully desegregate the workforce, fifty-three percent of all men or all women would have to switch occupations to those that are predominantly held by the opposite sex.¹⁵⁵ As this is unlikely to occur within the next few years, if at all, the proposed legislation of the Fair Pay Act is the only viable solution available to provide this class of workers in female-dominated jobs with the necessary outlet to assert their right to equal pay for equivalent jobs.

CONCLUSION

The benefits of the Fair Pay Act, if enacted by Congress, are many. In this modern age where women are frequently the sole support for their families, the need for pay equity is great. Women deserve to be paid equal wages for work of equal value to the employer. Discriminating against women serves only to deprive them of the needed income necessary to support their families.¹⁵⁶

Pay equity can only serve further to boost productivity ratings for employers by raising the level of morale in the workplace.¹⁵⁷ If workers

¹⁵³ Schafly, *supra* note 152, at 6.

¹⁵⁴ Zona Spaetch, a plaintiff in the lawsuit, *AFSCME v. Washington*, testified before Capitol Hill concerning her involvement in the case, stating: "I have never desired to work in the fields which are dominated predominantly by men. I have only wanted fair pay for the job I have." *Testimony on Fair Pay Act July 21, 1994: Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office Civil Service and the Subcomm. on Select Education and Civil Rights of the House Comm. on Education and Labor*, 103d Cong., 2d Sess. (1994), available in LEXIS, Legis Library, Cngtst File (testimony of Zona Spaetch, Spokane, Washington) [hereinafter *Zona Spaetch*].

¹⁵⁵ Heidi I. Hartmann, *supra* note 6.

¹⁵⁶ *Id.*

¹⁵⁷ Gene R. Voegtlin, *supra* note 4 ("High worker morale hinges on whether

believe they are being treated and compensated fairly for the work they perform, it can only serve to encourage pride in their occupations and a desire to perform such jobs to the best of their abilities. To eradicate wage discrimination will give those workers the dignity of being paid what they are worth.¹⁵⁸ As Zona Spaetch, a plaintiff in *AFSCME*, so succinctly stated:

Are the people who care for your children, nurse your father and mother, and teach in our public schools as valuable as the people who fix your plumbing and excavate the ground for buildings? Is the surgical nurse as valuable as the hospital administrator? Are the skills to operate the advanced technology in office equipment as critical as those needed to repair an electrical circuit? These are important questions which no doubt you will have to debate as you consider the Fair Pay Act.

The feminization of poverty is more than a concept, it is something which is very real to me. My mother, grandmother, and great grandmother, fought very hard to provide for families and maintain their pride and dignity, often at the expense of their own health. And now, my daughters continue to fight very hard to do the same in a very unequal workplace.¹⁵⁹

The Fair Pay Act will provide the nation with a clear set of remedies to address the realities of pay inequity in America today.¹⁶⁰ This legislation will pick up where the Equal Pay Act and Title VII have left off in the ongoing fight against sex discrimination in compensation. Congress and the courts have gone too far in their attempts to balance the inequities between the sexes to stop with the present legislation which, although instrumental in remedying the most overt forms of discrimination, falls substantially short of addressing the subtler forms of discrimination which pervade our society.

To believe the opponents of comparable worth is to believe that we live in a perfect society where women and men are evaluated on the basis of their skills alone and that both sexes have the same opportunities in employment and compensation. The reality is somewhat less than perfect.

the employees believe they are being treated fairly and consistently with management.”).

¹⁵⁸ *Hearing*, *supra* note 1 (testimony of Michele Leber, Treasurer, National Committee on Pay Equity).

¹⁵⁹ *Zona Spaetch*, *supra* note 154.

¹⁶⁰ *Gene R. Voegtlin*, *supra* note 4 (summarizing the provisions of the Fair Pay Act).

Thus, the passage of the Fair Pay Act is a necessary and vital next step on the path to equality in this country.

Rhonda Jennings Blackburn